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In The

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
AND
LAWRENCE W. I'ANSON,
IN HIS OFFICIAL CAPACITY
AS CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The "Motion to Dismiss or Affirm" fails to state any basis for this Court not to note jurisdiction and reverse the judgment of the District Court as requested in the Jurisdictional Statement.[1]

[1] The District Court found that the Chief Justice and the other defendants were immune from liability in their personal capacity for attorneys' fees. Accordingly, the style of the case has been amended to delete the reference to the chief justice of Virginia in his individual capacity.

I.

The Virginia Court Is Not Contesting On Appeal An Order It Proposed To The District Court

Upon remand, after the parties had negotiated an agreed version of the directory, Consumers Union submitted a proposed order enjoining enforcement insofar as the Rule would prohibit advertising as proposed in the directory, and declaring that the defendants had violated 42 U.S.C. § 1983. (App. A) The State defendants proposed an order (1) declaring the directory valid for publication, and (2) providing that defendants would be enjoined and restrained from enforcement of the rules and regulations "insofar as such regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiff for publication." (App. B) This proposed a limited ruling, found no violation of 42 U.S.C. § 1983, called for a limited injunction not significantly different from that sought in the complaint, and provided for no award of attorneys' fees. The District Court was exercising jurisdiction pursuant to 28 U.S.C. § 1343(3), under which a prevailing party is not entitled to an award of attorneys' fees.

If the District Court had entered the Order requested, the State defendants would have been satisfied to let this protracted litigation terminate. But that did not occur. Rather the District Court struck down the entire rule. Much of the rule was valid facially, such as the ban on false advertising. The District Court found that the defendants, including by implication the Virginia Court, had violated 42 USC § 1983 although no act of the court was cited as the basis for that finding. Relying on facts assumed but not in evidence, the District Court awarded attorneys' fees because of the Virginia Court's failure to amend the rule.

Neither party had requested a ruling that the rule was

unconstitutional on its face. This was significant to the defenses raised because Consumers Union's only complaint against the Court was that it had adopted the rule. Only if the rule was facially unconstitutional would there be a claim against the Court. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), had made it clear that the rule was not facially unconstitutional.

As the District Court Opinion makes clear, the Virginia Court, [illegible] timely fashion prior to the District Court's decision, raised the issue of judicial immunity from an award of attorneys' fees under 42 U.S.C. § 1983. (Jurisdictional Statement, app. 5) However, the issue of the court's immunity from declaratory or injunctive relief under 42 U.S.C. § 1983 was presented to the District court on petition for rehearing.[2] Because the Virginia Court had no notice the District Court would attach relevance to the failure to amend the rule, the petition for rehearing was the earliest reasonable opportunity to raise the immunity issue. The issue was presented in a manner which permitted a proper ruling thereon. A party need not plead immunity as long as the issue is presented to the trial court in circumstances which enable the court to rule on it without prejudice to the other party. *Eslinger* v. *Thomas*, 476 F.2d 225, 228 (4th Cir. 1976).

That there is a legitimate need to define the scope of judicial immunity is reflected by the fact that the parties have cited conflicting cases from most of the circuits. Such an important jurisdictional issue can be raised by this Court *sua sponte*. *See Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 99 S.Ct. 1171 (1979) (legislative im-

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[2] No facts relevant to the issue of immunity from judgment on the merits or from an award of attorneys' fees were in dispute.

munity). Accordingly, this Court properly should consider the issue.

II.
There Were Proper Special Circumstances

Until the decision of the District Court, defendants were in the process of concluding a case which was left without meaningful issues by the decision of this Court in *Bates*. The Attorney General of Virginia had held the rule unenforceable insofar as it conflicted with *Bates,* and the Bar was formulating new advertising rules. None of the defendants had any intention of enforcing any rule contrary to *Bates*. And the record is devoid of any evidence to support a conclusion to the contrary. The only act by the Virginia Court adverse to Consumers Union had been adoption of an advertising ban which had been customary since 1908. (Jurisdictional Statement, App. 2, p. 39.)

Thus the reason the special circumstances doctrine is applicable to require denial of an award of attorneys' fees against the Virginia Court is not merely that it acted in good faith, but also it acted in accord with the law when it adopted a rule for protection of the public, never taking any other action adverse to the plaintiffs. If the District Court had applied only proper factors in examining whether special circumstances existed, there would have been no basis for an award of attorneys' fees against the Virginia Court.

III.
The Supreme Court of Virginia Is Not An Administrative Agency

Supervision of the legal profession is a part of the "primary governmental function of administering justice." *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). This

is an inherent judicial power which may be exercised absent statute. *Brown* v. *Supreme Court of Virginia,* 359 F.Supp. 549 (E.D. Va.), *aff'd.* 414 U.S. 1034 (1973).

In Virginia, the Virginia State Bar is established by law as the administrative agency of the Virginia Court. § 54-49, VA. CODE ANN.[3] The Virginia Court is authorized by statute to adopt rules and regulations governing the profession. § 54-48(b), VA. CODE ANN.[4]

Accordingly, the adoption of the rule at issue is a judicial function. If it is not, it is a legislative function delegated by the General Assembly, which entitles the Virginia Court to an equal degree of protection.

CONCLUSION

The judgment of the District Court should be reversed insofar as it applies to the Supreme Court of Virginia and the Chief Justice. The award of attorneys' fees against the Virginia Court should be reversed. The judgment of the District Court should be modified to declare the rule unconstitutional only insofar as it is applied in a manner contrary to *Bates*. In the alternative, the case should at least be remanded with instructions to the District Court to take

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[3] Section 54-49 provides:

> "The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating, and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[4] Section 54-48(b) authorizes the Supreme court to adopt regulations: "Prescribing a code of ethics governing the professional conduct of attorneys-at law including the practice of law. . . ."

evidence on the question whether there were facts to justify an award of fees against the Virginia Court.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and
THE HONORABLE LAWRENCE W. I'ANSON,
Appellants.

By: s/MARSHALL COLEMAN
Attorney General of Virginia

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and counsel for the Virginia State Bar, *et al.*, hereby certify that three copies of this Appellants' Supplemental Response have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 9th day of October, 1979, as follows:

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All parties required to be served have been served.

s/ MARSHALL COLEMAN
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APPENDIX

PROPOSED ORDER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF UNITED STATES, INC., et al.,

Plaintiffs,

v.

AMERICAN BAR ASSOCIATION,

Defendants.

Civil Action No. 75-0105-R

ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in the light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order and findings in this case, except that portion of the Order and findings which prohibited the publication of information relating to prices charged by lawyers.

In light of the decision of the Supreme Court in *Bates, supra,* the Court finds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, information on the fees at which lawyers will perform routine legal services and other fee information, so long as the information is not false, deceptive or misleading.

The Court having received the directory proposed to be published by plaintiffs finds that the proposed directory will not mislead the readers.

It is therefore now DECLARED THAT:

(1) Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility violates the First and Fourteenth Amendments of the U.S. Constitution and defendants Virginia State Bar and Virginia Supreme Court therefore have violated said Amendments and 42 U.S.C. Section 1983;

(2) Any provisions of the Virginia Code of Professional Responsibility that prohibits, or has a chilling effect upon, the gathering, publication, or receipt of a law list or directory because it contains the types of information about attorneys contained in plaintiffs' Memorandum in Support of Plaintiffs' Motion for Judgment on the Merits, is in violation of said Amendments and 42 U.S.C. Section 1983.

It therefore is now ORDERED AND ADJUDGED that:

(1)(a) the Virginia State Bar and the Virginia Supreme Court, their officers, successors in office, agents, servants, employees and attorneys are enjoined from directly or indirectly promulgating, interpreting, administering, maintaining, or enforcing against plaintiffs or others Disciplinary Rule 2-102 (A)(6) or any other provision of the Virginia Code of Professional Responsibility that prohibits, or has a chilling effect upon, the gathering, publication, or receipt of a law list on the ground that it contains the types of information about attorneys contained in plaintiffs' proposed revised directory.

(b) Defendant Virginia State Bar (1) within thirty (30) days of the date hereof shall issue to plaintiffs an official certificate stating that plaintiffs' proposed directory is in

compliance with all lawful provisions of the Virginia Code of Professional Responsibility, and (2) in its next official mailing to members of the Virginia State Bar shall include an official notice to the effect that Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility has been declared unconstitutional by this Court and that members of the Virginia State Bar may not be disciplined for being listed in plaintiffs' proposed directory, so long as the information furnished by them does not violate any lawful provisions of said Code.

Let the Clerk send copies of this Order to all counsel of record.

Done this .... day of ....., 1978, at Richmond, Virginia.

United States District Judge

United States District Judge

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,

Plaintiffs,

v.

AMERICAN BAR ASSOCIATION, *et al.*,

Defendants.

Civil Action No. 75-0105-R

MEMORANDUM AND ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in the light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order in this case, except insofar as that order did not permit publication by the plaintiffs of certain information as to the fees charged by members of the Bar of Virginia for services.

In light of the decision of the Supreme Court in *Bates, supra,* the Court holds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which lawyers will perform routine legal services, so long as the information

published is not false, misleading or deceptive. It is therefore now

ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and they are hereby granted; that accordingly the publication described in Appendix A to the affidavit of Mark Silbergeld, dated May 12, 1978, is approved by the Court, and hereby is declared to be valid for publication; and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiffs for publication.

Let the Clerk send copies of this Memorandum and Order to all counsel of record.

Done this .... day of ....., 1978, at Richmond, Virginia.

United States District Judge

United States District Judge

United States District Judge